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Supreme Court of the United States

OCTOBER TERM, 1941

No. 721.

ISBRANDTSEN–MOLLER COMPANY, INC.,
Petitioner,

against

Motorship TOLEDO, WILH. WILHELMSEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTE

The Carriage of Goods by Sea Act (Title 46, U. S. Code, Secs. 1300-1315) 3, 4, 5, 6, 9, 12

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BRIEF FOR RESPONDENTS

The respondents oppose the issuance of a writ of certiorari herein because (1) the decision of the court below was correct; (2) no important question of law is presented; (3) the questions discussed in the petition, for the most part at least, do not arise in the case at all.

The District Court's findings of fact, which are accepted by both parties, are at pages 444-449 of the Record.

The Facts

A considerable further statement of facts is necessary.

The vessel was time chartered by her owners, the respondents, to the petitioner. The time charter appears opposite page 24 of the Record. Paragraph 15 provides:

> "That in the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the

purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost * * *."

Paragraph 16 provides:

"* * * The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter party, always mutually excepted."

The vessel was delivered under the time charter at Philadelphia. She loaded a part cargo there and some additional cargo at Chester, Pa., and then proceeded to New York, where she was to take the remainder of her cargo, all of which was for delivery in foreign ports. On the way to New York, a sound was heard from the engines which, upon examination after arrival at New York, proved to have been due to the breakage of a crankshaft web (Finding 7, pp. 445, 446). Examination showed a latent defect in the web, consisting of defective metal within the casting. This had existed ever since the ship's construction, some twelve years before, although no trouble had ever been experienced in the past. It was found by the District Court that the ship and engines had been constructed by competent builders, under the supervision of Lloyd's; that proper inspections had been made; that the defect was not ascertainable from without; and that the owners and the ship's crew throughout had exercised due diligence (District Court Opinion, pp. 434-436; Findings 9-15, pp. 446, 447). These were all questions of fact in the District Court, whose findings were in favor of the respondents and these findings were not challenged on appeal. The case is, therefore, one of accident due to undiscoverable latent defect.

The ship had to repair before she could make the voyage. The normal procedure would have been for the ship, when repaired, to carry the cargo, none of which was perishable.

This was evidently the intention of the petitioner in the beginning, for it wrote a letter, Exhibit F, stating:

> "this vessel is automatically off time charter, due to accident to machinery from such time as this accident occurred until such time as vessel is repaired and put in suitable condition."

Subsequently, because of pressure from its shippers (O'Neill, pp. 282-285; Exhibits G and H) and in order to please the shippers for reasons of business policy, the petitioner decided to discharge the cargo already loaded and to send it, together with the New York cargo not yet loaded, forward by other means and, accordingly, it did so.

The bills of lading issued for the cargo loaded at Philadelphia and at Chester (Exhibits B1-3 and C), as required by law (U. S. Code, Title 46, § 1312), incorporated the U. S. Carriage of Goods by Sea Act, as follows:

> "This bill of lading shall have effect subject to the provisions of the 'Carriage of Goods by Sea Act' of the United States of America, and the carrier (which term shall be deemed to include the ship and the shipowner) shall be entitled to avail itself of all the rights and immunities and all other restrictions upon liability contained in said Act, and shall not be deemed to have surrendered any of its rights or immunities or restrictions upon liability or to have increased any of its responsibilities or liabilities."

Paragraph 1 of the bills of lading provided that the ship "as a part of the voyage" may, "with or without the goods on board and before or after sailing, or at any stage of the voyage * * * drydock, go on ways, or to repair yards." (On reverse side, just above signature):

> "Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the carrier, cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; and in the event of the cargo or a part of it being forwarded by vessels of the same

> Line, or otherwise, the cost of forwarding shall be payable by the Owners or Consignees of the goods and shall constitute a lien on the goods."

All of the fifty-eight bills of lading were in this form, except five, whose provisions were the same in substance.

The cargo on dock at New York was under dock receipts (Exhibits 1A-C), which provided:

> "The goods are accepted for shipment subject to provisions of the company's usual bill of lading as revised to date, and including liberty to substitute any other steamer, and this receipt to be exchanged for each bill of lading."

The dock receipts fixed no date for sailing; on the contrary, they gave "liberty to substitute any other steamer" and they showed on their face that this right had been exercised in a large proportion of the cases, for many of the dock receipts originally named earlier vessels and had been changed to name the *Toledo*. The bills of lading also gave similar liberty.

The bills of lading were concededly those "customarily used" (O'Neill, p. 240) and, as provided in the dock receipts, they were binding on the cargo from the time of its receipt by the petitioner, whether or not the goods were loaded or bills of lading actually issued (*Luckenbach SS. Co.* v. *American Mills Co.*, 24 F. [2d] 704; *Eastern Outfitting Co.* v. *Pacific Mail SS. Co.*, 26 Fed. [2d] 270).

It will be observed from the foregoing that (1) the bills of lading embodied the Carriage of Goods by Sea Act, as required by law; (2) they contained express provisions that, if there were a forced interruption of the voyage and the goods were forwarded, the cost should be payable by cargo.

The Carriage of Goods by Sea Act (U. S. Code, Title 46, Secs. 1300-1315) provides:

> "SEC. 4 (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from un-

seaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * * *

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

As already stated, the findings below that due diligence had been exercised and that the accident happened without fault on the part of ship or owners, are not now questioned.

In connection with forwarding of the cargo, the petitioner wrote a letter (Exhibit 41) to each of the cargo shippers, in the form quoted at page 14 of the petition, requesting them to write a letter approving the petitioner's action "in transshipping the cargo *as your*" (i. e. cargo's) "*representative*," and assigning to the petitioner any claims which the cargo might have against the vessel or owners. Accordingly, the cargo interests sent to the petitioner the form of document requested (Exhibit 42, printed at p. 15 of the petition), which states that the forwarding expense "was incurred by you" (the petitioner)

"for our account" (i. e., for cargo's account), and assigns any claims which the cargo owners might have.

The petitioner brought suit (1) in its own right as charterer; (2) as assignee or "bailee" of the cargo. The second cause of action is stated (R., p. 22) to be "in tort."

I

The Opinion of the Circuit Court of Appeals.

A. *First cause of action.*

The Circuit Court of Appeals pointed out that both the letters and the assignments referred to above recognized that, under the bill of lading provisions, the expense of transshipment, if the goods were transshipped, was for cargo owners' account, and that the petitioner, in incurring it, was acting on their behalf. The Court further pointed out that, under the provisions of the bills of lading and of the Carriage of Goods by Sea Act, the petitioner was under no liability to cargo, if the voyage was delayed by the necessity of making repairs resulting from an accident which had not been caused by any lack of due diligence. Nor was there any special contract or agreement between the petitioner and the cargo interests which imposed any liability. As already stated, the normal course would have been for the cargo to be carried forward by the ship after repairs. If the petitioner chose, for the reasons of business policy already referred to, to send the cargo forward at once, it was entitled to do so, but not at the ship's expense, and the Circuit Court of Appeals so held.

B. *Second cause of action.*

In this cause of action, the petitioner sued "in tort" on behalf of and in the right of cargo, and by virtue of the assignments. The Circuit Court of Appeals quite cor-

rectly held that the petitioner had no other rights than those which cargo would have had; and since, under the bills of lading and the Carriage of Goods by Sea Act, the ship was not liable to cargo owners for an accident due to latent defect where due diligence had been exercised, therefore the petitioner, as charterer, had no greater rights. This is clearly a correct decision. Any claim of tort must be based on negligence and the undisputed findings negative any negligence.

It may be added that the owners of the cargo which had not yet been loaded on the ship obviously had no rights against either the ship or her owners, because there were no contractual relations between these cargo owners and the shipowners, the bills of lading for this cargo had not yet been issued, the cargo had not been loaded, and the shipowners had, as yet, no relation whatever to this cargo. Probably this is the reason why the second cause of action is stated to be "in tort". The respondents as shipowners owed no duty to this cargo nor were they guilty of any negligence. There was plainly no tort.

II

The Petition.

1. The petition states (p. 1) that the libel was dismissed by the Courts below. This is quite incorrect. The libelant received a decree for repayment of so much of the prepaid charter hire as had not been earned at the time of the breakdown (R., p. 455).

2. The petition states (p. 2 and elsewhere) that the Circuit Court of Appeals held that the petitioner was not a common carrier, but a mere forwarder. No such decision was made by the Circuit Court of Appeals and no such question is involved in the case. The petitioner did not argue this question in the Courts below, nor is it raised by

the pleadings or by the assignments of error. Moreover, it makes no difference whether the petitioner was a common carrier or not. The petitioner refers to *Isbrandtsen-Moller Co., Inc.* v. *United States,* 300 U. S. 139, where this Court denied an injunction to restrain enforcement of an order of the Secretary of Commerce requiring a steamship company to file a summary of its books and records for a specified period, showing commodities carried, rates of freight, etc. The opinion does not discuss the question of common carriage; and, of course, a company may be a common carrier in certain business relations and not in others. The case appears to have no bearing on that now before the Court.

3. The petition states, at pages 3 and 6, that the petitioner, as charterer, undertook to issue "its own" bills of lading, and, at pages 5 and 6, that the petitioner was the *only shipper* and the only person with whom the shipowner had any contractual relations; and further states, at least inferentially, at the bottom of page 5, that the bills of lading created no rights as between the cargo owners and the shipowner. These statements are wholly incorrect. The bills of lading name each individual shipper, specify the goods which he has shipped, and are issued, not by the petitioner on its own behalf, but

> "For and on behalf of the Master by
>
> ISBRANDTSEN-MOLLER COMPANY, INC.
>
> By ....., As Agents."

The very purpose of this form of signature was evidently to make it clear that the petitioner was not the carrier. Moreover, the time charter provides (par. 25) that it is not to be construed as a demise, "The Owners to remain responsible for the navigation of the Steamer, insurance, crew, and all other matters, same as when trading for their own account."

Furthermore, the bills of lading state that the term "carrier" shall include "the ship and the shipowner" (*supra*, p. 3). A bill of lading so signed binds the shipowner (*Tillmanns & Co.* v. *SS. Knutsford, Ltd.*, 1908, 2 K. B. 385, 394, 406, aff'd 1908 App. Cas. 406).

On the basis of its erroneous statement regarding the bills of lading, the petitioner suggests that the case raises fundamental questions of law as to the status of a time-charterer. It is respectfully submitted that no such question arises. The legal situation was a perfectly familiar one. The charter party, as between the shipowner and the charterer, was a private contract of carriage. If the charterer chose, as it had the right to do, to put the ship on the berth—in other words to offer her to the public—then the ship and her owners became common carriers *as between themselves and those cargo owners* whose cargo had been loaded on the ship and was covered by her issued bills of lading. The bills of lading in the present case were signed by the charterer as agents on behalf of the master, as the Circuit Court of Appeals correctly found (R., p. 484). This is, and for many years has been, one of the most usual arrangements for carriage. It involves no novelty whatever.

Such a bill of lading, when issued, of course creates rights and obligations as between the cargo owner and the shipowner. For example, the cargo owner can sue on it in his own name for damage to cargo. The shipowner can hold the cargo and its owner for freight (if not prepaid), for contribution to general average expenses, etc. These rights and obligations are defined in the Carriage of Goods by Sea Act.

Even if the petitioner were also to be regarded as a carrier (cf. *The Themis*, 275 Fed. 254, 262, 263 (C. C. A. 2), it would make no difference, for the "carrier," whether owner, time charterer, or both, was under no obligation to transship the cargo, because of the provisions of the bills of lading and of the Carriage of Goods by Sea Act. The petitioner's expenditures were entirely voluntary.

4. The petition throughout begs the question. It asserts again and again that the shipowner violated its contract and therefore must make good to the petitioner the expenses of transshipment, but it nowhere demonstrates that the petitioner was under any obligation to incur the expenses of transshipment. This fallacy runs throughout the petitioner's argument.

Again, at the top of page 11 of the petition, the assumption is made that it was "legally required" by the charter party that the cargo be transshipped at the shipowner's expense. There was no such requirement. On the contrary, paragraph 15 of the charter provided that, in case of such an accident, the ship should go off hire until repaired (pp. 1, 2, *supra*). A similar fallacy appears at page 16 of the petition, where the Circuit Court of Appeals is asserted to have held that the petitioner should recover "its expenses resulting from respondents' breach of contract * * * from the innocent cargo owners." The expenses in question did not result from any breach of respondents' contract, but from the petitioner's voluntary act; nor did the Court below hold or suggest that the petitioner had any right of recovery from the cargo owners.

5. It is suggested by petitioner that the Circuit Court of Appeals adopted two inconsistent theories. That is not the fact. The Court held (1) that the petitioner was under no liability as to cargo in respect of the accident; therefore, if it undertook expenses which it was not bound to incur, it was to that extent a volunteer; and (2) that, as recognized by the petitioner's letter (Exhibit 41) and by the assignments (Exhibit 42), under the bills of lading the petitioner was under no obligation to pay transshipment expenses. There is no inconsistency here; on the contrary, both propositions are correct.

6. The petition further assumes that it was the duty of the respondents to provide another ship when this acci-

dent occurred. No arguments are presented in support of this proposition, it was not asserted in the Courts below, and it is clearly unsound. Under the provisions of the time charter (par. 15), petitioner was entitled only to a return of charter hire paid in advance and unearned at the time of the breakdown. This measure of compensation was allowed below and petitioner is not entitled to any additional amount.

A time charterer has no property right in the ship. He has only a contract with the owner (*Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303). It is obviously appropriate therefore that his damages, in the event of loss of use of the vessel from accident, should be measured by the charter hire, as the contract provides. Clause 15 says that, "in the event of the loss of time from * * * breakdown or damages to * * * machinery", hire "shall cease for the time thereby lost." It does not give the charterer the option of deducting hire *or* of claiming damages, still less the right to do both. Its provisions are exclusive with respect to all cases where the use of the vessel is lost. In it the parties have enumerated a category of casualties not unlikely to occur, and have themselves provided what the effect of such casualties shall be. For loss of time due to breakdown, they have provided that hire shall cease. This is fair to both parties for, when the charter is made, it cannot be foretold whether such a provision will be to the advantage of the owner or of the charterer.

In *Clyde Com. SS. Co.* v. *West India SS. Co.*, 169 Fed. 275, the Circuit Court of Appeals for the Second Circuit analyzed a similar charter party and concluded that the breakdown clause

> "must be understood to state absolute categories in which the parties intended the hire to be suspended whether the owner was at fault or not. * * *" (p. 278).

In the *Ask*, 156 Fed. 678, 681, where the ship was about to load a cargo of bananas and became unseaworthy because of the partial collapse of her furnaces, Judge Hough said:

> "* * * For such contingencies the charter party provides a stipulated measure of damage—i.e., loss of charter hire—and no other measure is permissible, unless a covenant could be found in the contract obliging the vessel to transport the last cargo of the season from Nipe Bay, and no other. It is too plain for argument that no such contract was made."

In *Aktieselskabet Stavangeren* v. *Hubbard-Zemurray SS. Co.*, 250 Fed. 67, the time chartered vessel, having loaded a cargo, was disabled by breakage of her rudder. The Circuit Court of Appeals for the Fifth Circuit held that the breakdown clause, which was similar to that in the present charter, made

> "the cessation of hire, until the vessel is again in efficient state to resume her service, the agreed compensation the charterer was to be entitled to for a loss of time so occasioned" (p. 69).

In the *Bjornefjord*, C. C. A. 2, 271 Fed. 682, Judge Learned Hand in the District Court stated that the breakdown clause "completely defined the charterer's remedy, viz., to be relieved from payment of hire 'until the steamer was again in an efficient state to resume her service.'" The Circuit Court of Appeals affirmed, though without considering this question.

Accordingly, the Circuit Court of Appeals here correctly held that, in receiving back the hire which had been prepaid for the period of breakdown, the petitioner received all the damages to which it was entitled.

7. The petitioner refers to the case of the *Caledonia*, 157 U. S. 124, and to similar decisions. Of course both the Courts below recognized the *Caledonia* as authoritative, subject to the provisions of the Carriage of Goods by Sea

Act and of the charter party. This Court has frequently stated that the parties may exclude the rule of the *Caledonia* by contract,* and the District Court thought that the special terms of paragraph 16 of the charter party ("accidents of * * * machinery * * * *throughout this charter party always* mutually excepted") were such as to make the rule of the *Caledonia* inapplicable. This construction seems confirmed by paragraph 19, under which the shipowner would be entitled to contribution in general average for any sacrifices incurred in consequence of such an accident as the present. It would obviously be absurd to hold the shipowner liable in damages for such an accident and, at the same time, to let him recover back in general average. This, however, was only one of the grounds of the District Court's decision. The Circuit Court of Appeals considered it unnecessary to pass upon this question (p. 483), and based its decision upon other grounds.

8. The petition cites *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312, and the *City of Norwich*, 118 U. S. 468. The former case held that an insurer against cargo damage, upon paying the loss, was subrogated to the rights of the insured, and might sue the carrier; but that, where the contract of carriage contained a benefit of insurance clause, the insurer was bound by it, since he stood in the shoes of the insured. In the latter case, where a vessel sank from collision, she was afterwards raised and libelled for cargo damage, and it was held that the shipowner might limit liability as of the termination of the voyage and that hull insurance payable to the shipowner was no part of his interest in the ship or freight, within the meaning of the limitation law. It is not perceived that either of these decisions has the remotest bearing upon the case at bar.

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* *The Edwin I. Morrison*, 153 U. S. 199, at 210, quoted in *The Caledonia*, 157 U. S., at 130; *The Carib Prince*, 170 U. S. 655, at 659; *The Southwark*, 191 U. S. 1, at 6; *The Irrawaddy*, 171 U. S. 187, at 190; *Work* v. *Leathers*, 97 U. S. 379, at 380.

III

Conclusion.

The decision of the Circuit Court of Appeals was correct and no question of general importance, such as to warrant a writ of certiorari, is involved in the case.

The petition should be denied.

New York, N. Y., November 10, 1941.

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